

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS
LIABILITY LITIGATION

MDL No. 1657
Section: "L"
New Orleans, Louisiana
Thursday, March 1, 2007

TRANSCRIPT OF MONTHLY STATUS CONFERENCE AND MOTION PROCEEDINGS
HEARD BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(STATUS CONFERENCE AND MOTION)

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4 THE COURT: Be seated, please. I understand that I have
5 people on the phone. Let me mention that we are going to keep you
6 on the phone as long as it's quiet, but if it gets too noisy and
7 it's too distracting, I have a room full of people also here, I am
8 going to have to cut you off. So let's everybody listen until we
9 get to the point where you are interested in speaking and then I'll
10 have an opportunity to listen to you at that point.

11 Counsel, make your appearance for the record, please.

12 MR. DAVIS: Good morning, your Honor, Leonard Davis on
13 behalf of Plaintiffs Liaison Counsel, Russ Herman for the PSC.

14 MR. WITTMANN: Good morning, your Honor, Phil Wittmann for
15 the defendant Merck.

16 THE COURT: We are here today in connection with our
17 monthly status conference. I have received from the parties a
18 suggested agenda. I will take the agenda in the order given. First
19 State Court Trial Settings. Any information on that?

20 MR. WITTMANN: Yes, your Honor. We have at the moment the
21 trial of two cases in New Jersey, Hermans and Humeston case that's
22 pending in Atlantic County, New Jersey before Judge Higbee and a
23 jury. I understand that case will go to the jury today.

24 THE COURT: At least on its first phase.

25 MR. WITTMANN: On the issue phase of failure one. The

1 Schwaller case started this week in Madison County, Illinois. The
2 Berwick case is set for trial in the California Superior Court in
3 Los Angeles County, on April 10th, 2007. The Texas MDL has set the
4 Fowler case for hearing starting May 14th in Houston, Texas. The
5 Schramm case is set to be tried in the Philadelphia Court of Common
6 Pleas on May 21st, 2007. In September the Donohoo case is set for
7 trial in Madison County, Illinois. It's September 10th I believe.
8 The Frederick case is set for September 17th in Birmingham, Alabama.
9 And the Kozic case is set for September 17th in Tampa, Florida.

10 MR. DAVIS: In addition, we were recently informed that
11 there is a March 19 hearing in the Local 68 case in New Jersey.

12 THE COURT: All right. And we tried six trials in this
13 MDL proceeding, and as I have said previously, the trials were set
14 to be the bellwether cases. We tried to divide the litigation, as
15 you know, into several areas and to select trials for representative
16 cases in those particular areas. I really focused the trials, not
17 only on those particular cases but we tried to use the trials for
18 informational purposes; that is to say, to give both sides an
19 opportunity to see how their theories work in practice before real
20 live juries, one in Texas and the others here in Louisiana.

21 And also to get some handle on the costs involved in
22 trying those cases. Now, I might say that the costs were rather
23 high, but I do recognize they were bellwether cases and hopefully
24 that amount would not be necessary to be expended by either party in
25 the routine cases, other than bellwether cases.

1 Also, I think the trials were helpful from the plaintiff
2 standpoint to devise or to develop a package which is their
3 responsibility and deliver that package to people outside of the
4 committee so they can simply use that package and then garnish it
5 with some specific witnesses dealing with their particular case. I
6 think that those bellwether trials have been helpful to the
7 plaintiff from that standpoint.

8 From the defendant's standpoint, hopefully they've been
9 helpful to the defendants to see what theories of liability the
10 plaintiffs have and how they can devise or develop defenses to those
11 theories. I haven't had another series of trials, but I am going to
12 be focussing shortly on trials and maybe focussing on some different
13 aspects of the trials, but I will get with counsel and discuss it
14 with them before I make any decisions on it.

15 The next item on the agenda is Further Proceedings in the
16 Early Trial Cases. Two other cases we tried Irvin/Plunkett and the
17 Dedrick case, and we have motions for new trials in both of those
18 cases. I've discussed dates with the parties, they have some
19 conflicts, and they are going to get together and get back to me by
20 Monday and I will have those dates solidified and we will take them
21 up and deal with them.

22 Item three on the agenda is Class Actions. Anything on
23 the class actions?

24 MR. WITTMANN: Yes, your Honor. Before we get to that, on
25 the Barnett case, didn't you set the argument on the Barnett motion

1 for new trial on all issues for March 29th?

2 THE COURT: Yes, but there is some problem with the March
3 29th date, and I thought that counsel were going to get together on
4 it and get some other dates?

5 MR. WITTMANN: All right.

6 MR. ROBINSON: Your Honor, this is Mark Robinson. I
7 talked to Mr. Beck yesterday and I thought that March 29th was okay?

8 THE COURT: Mark, we talked this morning and there was
9 some question they needed to talk to you about.

10 MR. LEVIN: Mark, there was some question about March 29th
11 because we had it calendared for the 29th also, but the Ray
12 deposition was scheduled on March 29 and this then March 29th become
13 problematic, so I will be talking to you after this conference.

14 MR. DAVIS: We will let the court know by Monday whether
15 the 29th will go or whether it won't, and we will advise the court
16 by Monday.

17 THE COURT: Get with Mark on that from his standpoint and
18 pick a date and then let me know and we will deal with it on that
19 date.

20 MR. ROBINSON: My problem is that Berwick case in
21 California is our firm out here, so I was hoping to get this done on
22 the 29th.

23 THE COURT: Talk with them, Mark, and see what can be
24 done.

25 MR. ROBINSON: I will, your Honor, thank you.

1 MR. WITTMANN: Your Honor, the class actions, you have
2 under advisement the Motions to Dismiss the Master Complaints for
3 Medical Monitoring and Purchase Claims. I see Mr. Levin rising.

4 MR. LEVIN: That's only so he doesn't say something wrong,
5 your Honor.

6 MR. WITTMANN: Also on January 29th the PSC filed a motion
7 for leave to amend the Personal Injury and Wrongful Death Second
8 Amended Master Class Action Complaint to add a class rep from Iowa.
9 We filed an opposition on February 16th and also filed a Motion to
10 Strike Class Allegations in Plaintiffs' Medical Monitoring Master
11 Class Action Complaint. The plaintiffs will file their reply brief
12 and their opposition to our motion to strike, they have filed it
13 already -- I'm sorry, by March 19th they will file it, and we will
14 file a rely by April 2nd, and we will be prepared to select a
15 hearing date after that. We may be able to do this at the next
16 status conference on April 12th.

17 MR. LEVIN: He didn't get the juris prudence right but he
18 got the dates okay, your Honor.

19 THE COURT: All right.

20 MR. WITTMANN: All right.

21 THE COURT: Next item is Discovery Directed to Merck.

22 MR. DAVIS: Your Honor, we have continued to talk with
23 Merck regarding discovery. We are still getting that on a rolling
24 basis. However, with respect to the documents that Merck has
25 claimed a privilege to, we've addressed that further and those

1 issues are becoming more and more of greater importance in this
2 matter. They are impacting items such as scheduling of depositions,
3 they are impacting items such as motions that are before the court.
4 And we have spoken about ways to try to resolve that, but quite
5 frankly, your Honor, whatever we can do to assist the court in those
6 privilege documents, PSC is ready to assist.

7 THE COURT: What I am going to do, I mentioned it this
8 morning at the status conference with the committee, I am going to
9 be appointing -- I thought I could do it with magistrates around
10 here, but unfortunately we're inundated with Katrina based cases and
11 we've got thousands of those cases and we've got those folks tied up
12 there, so I am not going to be able to get their sole attention
13 without some difficulty. So I am going to be appointing somebody
14 from the outside to look at the material with me or for me, and I
15 will get some resumes, I've already talked to some folks, at least
16 one, and I will run past counsel for their input and then we will go
17 with it. But I hope to have that done shortly.

18 MR. DAVIS: If there is anything we can do from liaison
19 counsel or the PSC's office, we will be happy --

20 THE COURT: I will be getting with you for your input.
21 Discovery Directed to Third Parties.

22 Just for the folks outside of the room, I am dealing with
23 about 84 boxes of material, which I've gone through one time and the
24 circuit has asked me to go through a second time, and we've
25 repackaged them in some ways and dealt with them a little bit, but

1 I've got to pick up the pace and get it done. So I may have to go
2 outside of my staff.

3 Discovery Directed To Third Parties.

4 MR. DAVIS: We can pass on that right now. That really
5 can come behind the prior one.

6 THE COURT: Deposition Scheduling is No. 6.

7 MR. DAVIS: We have spoken to Merck about scheduling a
8 number of depositions. The parties are working to get those matters
9 resolved.

10 With respect to quite a number of depositions,
11 specifically Barr, Silverman, Counihan, McClarity, Howes, and there
12 may be others, there are a number of issues that relate to the
13 privilege documents that we were just speaking about. And we have
14 spoken with Merck about how to deal with this and we will be
15 presenting motions to the court. Obviously if the privilege
16 documents are taken care of prior to the motion, it resolves the
17 motion; otherwise we would have those motions before the court.

18 THE COURT: I do have some issues before me that need to
19 be focused on for the benefit of everybody. Those privileged
20 documents are key. The preemption is a key area. Some of the
21 others that I dealt with yesterday, the statute of limitations is
22 significant, and a couple of issues that really cut across
23 everything so that everybody ought to either profit or benefit at
24 least from the court's review on those.

25 MR. WITTMANN: Your Honor, Merck will also be scheduling

1 depositions for trial preservation purposes and we're working with
2 the Plaintiffs Liaison Counsel to do that.

3 MR. DAVIS: All of those, your Honor, just so the court is
4 aware and others are aware, are for use in the trial package. We
5 are very mindful of getting the trial package ready and we are
6 mindful of the fact that people may ask for it, or are asking for
7 it. But the trial package is in the works.

8 THE COURT: Yes. You've heard me speak on this before,
9 but one of the problems that I see with MDL, and hopefully all MDL
10 transferee judges are aware of it and focused on it, is that we have
11 to watch the MDL not becoming a black hole or a warehouse for cases
12 that just sit and languish and pick up dust and then eventually the
13 parties get so frustrated by it they just either quit or throw up
14 their hands or whatever it is, deal with it in some way that's not
15 good for the system and not good for the litigants.

16 I am really conscious of that and I've tried to push this.
17 We've had this case now about two years. We've already tried six
18 cases in that period of time and developed millions of documents of
19 pages of material and a host of depositions, probably 40 or so
20 depositions, if not more. So we are moving but there are some
21 issues that I do have to focus on and I am aware of it and I am
22 going to be focused on them very quickly.

23 We are getting some feedback from somebody on the line. I
24 hope that doesn't continue because I don't want to cut everybody
25 off, but we do have to be conscious of that.

1 Plaintiff Profile Forms, the next issue.

2 MR. WITTMANN: Yes, your Honor, we've got, I believe we
3 have on the line someone from the Mithoff Law Firm in connection
4 with the case of Dina Romandia.

5 MR. SOVANY: Herrick Sovany on behalf of Joe Alexander.

6 THE COURT: Would you tell us again.

7 MR. SOVANY: This is Herrick Sovany. Am I speaking loud
8 enough?

9 THE COURT: Yes, but would you spell it for us, please.

10 MR. SOVANY: First name H-E-R-R-I-C-K, last name
11 S-O-V-A-N-Y.

12 THE COURT: All right. Tell us a bit about your problem.

13 MR. SOVANY: Our problem is we have a foreign plaintiff
14 from Mexico who received Vioxx in Mexico but she had her event in
15 New Jersey. We have filed the case in New Jersey and Merck sent us
16 a deficiency on our plaintiff profile form. We redid that and we
17 are waiting for the Merck profile form and so we sent a letter, a
18 timely letter in January requesting that Merck produce the MPF.
19 They are saying that they don't have to produce it because it's a
20 foreign plaintiff and it would be too burdensome, so they are not
21 going to produce the MPF.

22 THE COURT: Let me ask you. You say that your client
23 lives or resides in Mexico and she received Vioxx in Mexico?

24 MR. SOVANY: Correct.

25 THE COURT: When you say she had the event in New Jersey,

1 what do you mean by that?

2 MR. SOVANY: She actually had her heart attack in New
3 Jersey, she was on vacation in New Jersey when she actually had her
4 stroke.

5 MR. WITTMANN: And, your Honor, it's Merck's position that
6 the foreign cases should be tried in the foreign country where the
7 plaintiff resides. And if this is the case, we will be filing a
8 motion to dismiss on forum non conveniens, and we don't believe that
9 a Merck profile form is required on those foreign cases. As you
10 know, foreign class action complaints were dismissed by the court,
11 and insofar as we're concerned, we don't need a plaintiff profile
12 form and we don't propose to provide a Merck profile form.

13 THE COURT: You have to get that to me in terms of a
14 motion. Let's contact or get with the Merck lawyer, get in touch
15 with the plaintiff lawyer here, and if you intend to file a motion
16 you have to file a motion, then I'll hear from the plaintiff and
17 I'll deal with it.

18 The issue before me is going to be forum non conveniens,
19 the issue before me is going to be whether or not someone from
20 Mexico who consumes Vioxx or purchases Vioxx in Mexico, comes to
21 this country, probably consumes at least some Vioxx while they're in
22 this country and has a heart attack while they're in this country,
23 whether that distinguishes them from the foreign cases that I have
24 been dealing with or have dealt with on class action focus. In
25 those cases, Italian and French and English plaintiffs bought Vioxx

1 in their respective countries, consumed them in their respective
2 countries, sustained injuries in their respective countries and then
3 filed suit in this country.

4 MR. DAVIS: Your Honor, we assume that Mr. Mithoff will be
5 briefing this and the PSC will not be briefing this matter. But
6 just so that we are clear, the PSC believes that if a PPF is filed
7 and a deficiency letter has been sent by Merck, certainly the
8 plaintiff ought to get a Merck profile form in response.

9 THE COURT: Okay. All right. Let's do this. I'd like to
10 have it, maybe not resolved, but at least filed or something dealt
11 with by next meeting, so let's get with the plaintiff lawyer and get
12 the necessary documents filed.

13 MR. WITTMANN: I will do that, your Honor.

14 MR. SOVANY: Thank you, your Honor.

15 THE COURT: State and federal are the next items --

16 MR. WITTMANN: Whoa, whoa, before we go there, Judge.

17 THE COURT: All right.

18 MR. WITTMANN: We've got the Rule To Show Cause for
19 Dismissal of 11 cases, I've gone over these this morning with
20 Mr. Davis.

21 THE COURT: I will take those up after this conference.

22 MR. WITTMANN: After the conference, okay.

23 THE COURT: I'll take them up after the conference and
24 I'll go through one at a time, and I'd like counsel for the record
25 to indicate who they are, the docket number, when they were served,

1 when the notice was given first and the notice given second, and
2 what, if any, information they received and then I'll deal with
3 them. Just as I did with the other ones that were dealt with in
4 October of 2006.

5 MR. DAVIS: Your Honor, on January 22nd, last week, Merck
6 advised the PSC -- I'm sorry, on January 22nd Merck advised that it
7 was seeking the PSC's concurrence with respect to two orders. The
8 first was a deadline for submission of PPF's by Louisiana residence
9 affected by Katrina, plaintiffs represented by Louisiana counsel,
10 and pro se plaintiffs. In addition, Merck also asked for some
11 relief in the administrative burdens that we've had with respect to
12 authorizations.

13 Last week, February 26th, we got from Merck some proposed
14 orders. We have circulated those to the PSC and we will be getting
15 back to Merck on that by next Friday.

16 THE COURT: What is that about specifically?

17 MR. DAVIS: One of the requests is to clear up problems
18 that the parties are having with respect to authorizations in
19 getting medical records. As you know, these authorizations by some
20 of the medical providers are claimed to be stale and this will allow
21 some additional time for the authorizations to be live or to be
22 used. We are looking at the proposed order that Merck sent over and
23 we will be back to them on that one.

24 The other request is to get plaintiff profile forms from
25 the Louisiana claimants and the pro se's who were given relief by

1 the court as a result of the hurricanes and given some extension of
2 time. Merck would like to get some of those responses in that
3 haven't come in thus far. We are mindful of that, and we are
4 looking at that order. We've addressed the order very briefly
5 because we just got it, but we will get back to Merck on that and we
6 will be able to report to the court sometime thereafter.

7 THE COURT: All right.

8 MR. WITTMANN: The problem is we don't get that
9 information, Judge, and some of these matters are going to get stale
10 and the records will be lost, and so we are ready to get it moving.

11 THE COURT: I know the problems that we've had locally
12 here, but we've got to cut through that because those folks will be,
13 they need, if anything, they need to be at the front of the line as
14 opposed to the bottom of the line. So when can you do that?

15 MR. DAVIS: We will get back to Merck by next Friday with
16 a response and then we will see what happens, and we will report to
17 the court thereafter.

18 THE COURT: Let me hear from you all on that.

19 MR. DAVIS: Will do.

20 THE COURT: Okay. Anything else on that item?

21 MR. DAVIS: No, that's it. State/Federal is next.

22 THE COURT: What about State/Federal Coordination,
23 Ms. Barrios?

24 MS. BARRIOS: Good morning, your Honor, Dawn Barrios,
25 State Liaison Committee. At our last status conference you had

1 asked me to get involved with the issue regarding the Plaintiff's
2 Steering Committee motion to quash the cross notice of the Texas
3 depositions, and at your request I assisted with that and had sent
4 you a letter indicating that the parties had worked the issue out
5 and it is now moot.

6 THE COURT: Great. I appreciate your efforts on that. I
7 think it was very helpful.

8 MS. BARRIOS: Thank you, your Honor. I would like to add
9 an additional case that is set for trial that is not included on the
10 earlier list. Ms. Kathy Snapka, who is making an appearance today,
11 she has another one of her cases, the name is Charles Zajicek,
12 Z-A-J-I-C-E-K, is set for trial before Judge Williams on October
13 22nd in Texas. It is not before Judge Wilson, the Texas MDL judge,
14 because it was filed earlier than the creation of the MDL.

15 I have again our two disc set of remands. And, your
16 Honor, we've undertaken a project that I called to my office quality
17 assurance. I've had paralegals and myself go back through the discs
18 that we had previously given you. We had discovered many technical
19 errors in the electronic linking of the documents, particularly
20 after Hurricane Katrina, so I am proud to say that we've cleaned up
21 all of those errors for you, we've organized it as much as we
22 possibly we can. We stand ready, willing, and able to do whatever
23 you ask on the remand project.

24 THE COURT: Do you have them by state?

25 MS. BARRIOS: Yes, your Honor. We have them by state and

1 we broke them down in the states into issues. So if you wanted to
2 look at Alabama, you would look at the reason the remand was sought,
3 whether it was a physician, the naming of a physician or a
4 particular state statute. And we are happy to do little memos for
5 you to assist you in any regard because the request for remands is
6 growing on a daily basis.

7 THE COURT: Let me just speak generally on remand. In
8 these cases, particularly in a failure to warn case and a drug case
9 of this sort, there are issues that would indicate that the cases
10 when they're scrutinized should in likelihood be remanded simply
11 because at least from the standpoint of the pleadings, which I have
12 to assume are correct, someone, a doctor or pharmacy is sued, it's
13 hard to say that a doctor or pharmacy being a learned intermediary
14 is not potentially responsible, potentially liable, potentially
15 suable and that that defeats diversity and the case should go back.

16 The real world situation that I am trying to deal with is
17 I am trying to get as much discovery and as much resolution of
18 common issues as I can while the cases are here so that those cases
19 don't go back naked, so to speak, that they don't go back without
20 any information at all. And so my approach generally is not to
21 immediately remand because, frankly, you can develop more
22 information in the MDL if you do it quickly than you can on your own
23 in other areas of state and federal court because you've got a
24 concentration in the MDL which gives you some benefit cost wise, as
25 well as scope and focus wise. And you've got national reach that

1 the MDL transferee judge has, which can cut through a lot of the
2 discovery issues which you can't do when you are in a single case.

3 Oftentimes you feel you don't need that. Well, if you
4 look at the cases that we've tried, you do need it and so I've been
5 trying to recognize that. I know interested parties want to get
6 back and try their case, but I still have a couple of issues: One,
7 a production, the privilege log that hopefully I can deal with in
8 the immediate future. The preemption issue is critical, and there
9 are some other issues that are germane to everybody and will be
10 applicable to everybody. So I am trying to give you the benefit of
11 that. But the likelihood is that when I focus on those cases, they
12 may be leaving us.

13 MS. BARRIOS: Yes, your Honor, I appreciate your comments
14 because all of the audience will hear them and understand what your
15 thinking is on the issue.

16 THE COURT: Also when we've tried these cases, and it's no
17 secret, it gives you, both sides, an opportunity to look at the
18 cases and hopefully evaluate the cases. And that also is something
19 that I think the people who are here will profit from if we get that
20 focused. Hopefully we can get everybody focused on that and I think
21 that that can be helpful, too. So we are precariously perched at
22 this point and I just need a little more patience from you. And I
23 think that it's just best for everybody concerned if I don't
24 automatically, immediately start sending back these cases. I think
25 it's going to be more problematic to you than you think and you may

1 be losing some opportunities, and you're not going to be able to get
2 back on the boat once I do that. You're off the boat and you never
3 get back.

4 So before I jettison you, you've got to let me finish this
5 aspect of the voyage. It's not going to be long, but it's something
6 that we just need a little more patience from you.

7 MS. BARRIOS: Yes, your Honor, as long as land is in sight
8 I think everybody can.

9 THE COURT: I am beginning to see a little bit, at least a
10 bird or two. I know that land is not too far away.

11 MS. BARRIOS: Good.

12 THE COURT: But I do need your patience a little while
13 longer.

14 MS. BARRIOS: Yes, your Honor. And the last thing I would
15 like to address with the court. If the court recalls, you had
16 remanded Kathy Snapka's Garza case, it went to trial in Texas.
17 Ms. Snapka is here and she has another similar issue she would like
18 to raise with the court.

19 And for the record, I gave both parties copies of the CD's
20 of remand and I am going to give it to your law clerk. Thank you,
21 your Honor.

22 THE COURT: Thank you.

23 MS. SNAPKA: Your Honor, Kathy Snapka of Corpus Christi, I
24 appreciate the opportunity to address the court.

25 THE COURT: Sure.

1 MS. SNAPKA: I can speak for all plaintiffs who have cases
2 waiting for remand to say that we appreciate the words that you have
3 just spoken, it gives us great comfort. However I would
4 respectfully request that this court consider a category of cases.
5 This court will recall that in the Garza case, this was a case again
6 filed prior to the removal of Vioxx from the market, that it was
7 removed, remanded and removed on the eve of trial. I have another
8 case, the Nettles case which has just been transferred in, which was
9 filed, it was removed in August of 2005, it was remanded by Judge
10 Marcia Crone, and it was again, it was sent to the MDL for
11 consideration and it was removed again.

12 I respectfully request that this court as a special
13 category, perhaps not to wait for the rest of these, where there
14 have been multiple removals by Merck that the court consider these.
15 I don't know how many others, I don't know why I personally have two
16 cases that fit into that category, but if there have been cases that
17 have been removed multiple times by Merck this court consider that a
18 particular category of case.

19 THE COURT: Let me look at that. The Garza case was tried
20 I know, and is it still on appeal?

21 MS. SNAPKA: Your Honor, a motion for new trial was -- the
22 judgement was entered, motion for new trial was heard and no ruling
23 has been issued. It will probably be overruled by operation of law
24 of the expiration of 75 days and will go up on appeal.

25 THE COURT: I see. Okay.

1 MS. SNAPKA: Thank you, your Honor.

2 THE COURT: Thank you. Anything further on that item?

3 MR. WITTMANN: No, your Honor.

4 MR. DAVIS: No.

5 THE COURT: And can you bring that case to my attention.

6 MS. BARRIOS: Your Honor, we put it on the disc, and it's
7 labeled that it's the second remand.

8 THE COURT: Okay.

9 MR. DAVIS: Your Honor, with respect to pro se claimants,
10 as orders come out from the court and as those arise, liaison
11 counsel is dealing with those. One in particular, Mr. Harrison we
12 have been dealing with, Merck has provided to Mr. Harrison
13 confidentiality agreement and letter, which Mr. Harrison has
14 provided back to my office. I spoke to Mr. Harrison yesterday. He
15 told me that he would Fed-Ex it to me and I should have it today and
16 I will provide that to Merck.

17 In addition to that, we have told Mr. Harrison that as
18 soon as we get that and we get some signed agreements with him with
19 respect to confidentiality within the plaintiffs' depository, then
20 we would be happy to have him in. There are a couple of issues that
21 we would like to address and the court's involvement would be very
22 beneficial, and we've spoken to Merck about that. One is that we
23 want to be certain that there isn't an inadvertent disclosure and a
24 clawback provision in place, is No. 1; and No. 2, we want to be sure
25 that this doesn't constitute a waiver of any work product or

1 privilege. And if we could get some assistance from the court, I
2 believe all parties are agreeable to that, I've spoken to
3 Mr. Harrison, I know he is, and I know that Merck is here to speak
4 to that, if they care to.

5 THE COURT: I'm in favor of that. What you need to do is
6 draft something for the court and run it past Merck for their input
7 and make it a joint motion and everybody protects their rights, and
8 we will get Mr. Harrison an opportunity to look at some material.

9 Mr. Harrison, I want you to have an opportunity to look at
10 the material, but I do need you to have a heads up on the fact that
11 the issue in your particular case is going to come down to causation
12 and the issue in your particular case is going to be the
13 presentation of any evidence supporting that malady being caused by
14 the ingestion or taking of Vioxx. And that is a critical issue in
15 your case, and so it would not surprise me if down the road not too
16 long there is a motion filed by Merck to dismiss the case after
17 you've had an opportunity to review the material, and I am going to
18 have to give you an opportunity to respond, but that is a critical
19 motion at that point. And so you need to be aware of that. And
20 again, if you can get counsel to assist you, you need counsel on
21 that issue.

22 MR. HARRISON: Your Honor, sir, can you hear me, sir?

23 THE COURT: You have to speak a little louder,
24 Mr. Harrison.

25 MR. HARRISON: Can you hear me now, your Honor?

1 THE COURT: Yes, I can.

2 MR. HARRISON: I had a phone blip so I didn't hear all of
3 the information, I did hear most of it. I am aware that my
4 situation is different than the discovery that I will be looking at
5 per se, which is one of the reasons why I look to be remanded, but
6 I've accepted this type of procedure. And nobody has to worry about
7 disclosing. I fully understand the contract and will not disclose
8 anything. I did miss your comment on the Merck dismissal.

9 THE COURT: Let me mention it to you again. What happens
10 in these matters that have an issue of causation, that is to say
11 medical causation issues, that has to be reviewed, you have to have
12 some basis for claiming a medical causation issue and that generally
13 is done by producing a medical report, by producing a doctor report
14 that says it's caused and then a doctor explains how it's caused and
15 he points to various studies that show that the cause is related and
16 how it's related, and we call them Daubert issues or 702 issues
17 under the Federal Rules of Evidence. But there has to be some
18 reasonable methodology between the ingestion and the cause of your
19 malady, and that has to be, may not be generally accepted in the
20 medical community, but it has to be based on an opinion which is
21 arrived at through a reasonable approach.

22 And if it's not, then the defendant moves to dismiss the
23 case. And if they move to dismiss the case, you have an opportunity
24 to come in and explain why it should not be dismissed. But that is
25 a beginning issue, a sentinel issue in every case and in particular

1 in your case.

2 MR. HARRISON: In my view, sir, my evidence actually is
3 very, very strong and it's really a matter of when and how I present
4 this. I had thought it would be part of the discovery process, but
5 I am more than ready to show what I have.

6 THE COURT: Well, I'm sure you will be given an
7 opportunity to do that in not too long.

8 MR. HARRISON: Thank you, sir.

9 THE COURT: Thank you.

10 MR. DAVIS: Your Honor, with respect to IMS data, we are
11 continuing issues with that, we can pass on that for this status
12 conference.

13 THE COURT: Okay. Next one is Merck's Motion for Summary
14 Judgment.

15 MR. WITTMANN: You've already addressed that, your Honor,
16 with respect to the preemption issue.

17 THE COURT: Tolling Agreements is the next item.

18 MR. WITTMANN: Your Honor, we are working on a stipulation
19 that will permit the claimant profile forms that have been filed in
20 connection with the tolling agreements to be converted to plaintiff
21 profile forms simply by filling out an addendum. And we are
22 preparing a stipulation to submit to the Plaintiff Steering
23 Committee to review and should have it out next week.

24 THE COURT: All right. Let me know about that one.

25 MR. DAVIS: We will look at that and we will respond in

1 due course.

2 THE COURT: All right. Let me hear from you by next week
3 so that I'll keep on top of it.

4 The Issues Relating to Pretrial Order No. 9, that's been
5 resolved as I understand it.

6 MR. DAVIS: Your Honor, we have received from Texas a
7 letter on February the 9, and we are pleased to report that that has
8 been resolved. We appreciate all of the efforts of Ms. Barrios,
9 Shelly Sanford and others who were involved in that.

10 The PSC in addition would like to now attempt to work out
11 similar agreements with Texas, California, New Jersey and the like.
12 And hopefully we will have those done.

13 THE COURT: The cases in the MDL, as well as in New
14 Jersey, California and Texas consume about 98 percent of all of the
15 Vioxx cases filed in the nation, and the judges, I and the judges
16 from New Jersey, California and Texas have met on a number of
17 occasions and we've talked on the phone a lot and we are trying to
18 coordinate our efforts so that it's for the benefit of the litigants
19 and for the benefit of the litigation. So I do appreciate all of
20 the help that they've given to the MDL in that regard.

21 The Vioxx Suit Statistics.

22 MR. WITTMANN: Your Honor, there are 27,400 lawsuits of
23 which we're aware as of December 31st, 2006. Approximately 8,300 of
24 those cases are in the MDL, and approximately 19,100 are pending in
25 state court, which the bulk of which would be in the jurisdictions

1 your Honor just mentioned. And that pretty much sums it up.

2 THE COURT: What about the tolling agreements in addition
3 to the 8,000 -- I have how many thousand?

4 MR. WITTMANN: As of December 31st, your Honor, we had
5 approximately 14,180 tolling agreements.

6 THE COURT: So that that's added to the 8,000 would be the
7 figure that we would be looking at here; is that correct?

8 MR. WITTMANN: That's correct, your Honor.

9 THE COURT: What about those tolling agreements, are we
10 expecting them to be filed?

11 MR. WITTMANN: The tolling agreements?

12 THE COURT: Yes.

13 MR. WITTMANN: They have been agreed to, the tolling
14 agreements have been received, we've gotten the claimant profile
15 forms with respect to the tolling agreements.

16 THE COURT: Do you see them eventually needing to be filed
17 in this court? I am just trying to figure out whether or not to
18 alert my clerk's office or not.

19 MR. WITTMANN: At some point I think that the tolling
20 agreement, we are going to ask the court to cut it off. At that
21 point you will probably definitely receive some more cases.

22 THE COURT: Okay. All right.

23 MR. DAVIS: Your Honor, we will work with Merck so that
24 the clerk's office is not inundated. I well understand the problems
25 that the clerk has recently had as a result of hurricane cases and

1 the like, and we will work with Mr. Wittmann's office and Merck so
2 that the clerk isn't all of a sudden inundated. We would hope that
3 that tolling agreement is not pulled without plenty of notice.

4 MR. WITTMANN: We are not going to pull anything without
5 the court being aware of what we're doing, your Honor.

6 THE COURT: I understand. Merck Insurance is the next
7 item.

8 MR. DAVIS: That's set for hearing following the
9 conference.

10 THE COURT: Right. Okay. Further Proceedings is the next
11 item.

12 MR. WITTMANN: Your Honor, we've talked with you this
13 morning at the preconference with respect to further proceedings in
14 the MDL, and your Honor has addressed that briefly already this
15 morning with respect to the issues you're looking at and how to go
16 forward in the MDL with additional trials.

17 THE COURT: All right. And the Statute of Limitations
18 Motions, I heard that yesterday. And I told counsel my feelings on
19 it and I'm writing it up as we speak.

20 Discovery Relating to the Martin Report is another item
21 that I talked about yesterday and told counsel how I feel about it,
22 and I will be drafting something on that.

23 New items, Virginia Nadine Perry, Remand Motion.

24 MR. DAVIS: Your Honor, we communicated with Brad Freeman,
25 counsel for Virginia Nadine Perry. I believe that Mr. Freeman may

1 be on the telephone participating.

2 THE COURT: Mr. Freeman, are you there?

3 (NO RESPONSE BY MR. BRAD C. FREEMAN.)

4 THE COURT: Ms. Virginia Nadine Perry, are you there?

5 (NO RESPONSE BY MS. VIRGINIA NADINE PERRY.)

6 THE COURT: Apparently not.

7 MR. HERMAN: We had received a request from Mr. Freeman's
8 office that this matter be moved to trial. We had suggested to
9 counsel that they participate by phone so that they could address
10 the issue with the court.

11 THE COURT: Tell them to write me a letter setting forth
12 all of the reasons, and I'll give them a week to do that.

13 MR. DAVIS: Will do.

14 THE COURT: Next status conference will be on April the
15 12th. I will meet with liaison at 8:30 and the general meeting at
16 nine. Anything further from anyone?

17 MR. WITTMANN: Your Honor, we have our rules with respect
18 to the 11 cases I mentioned, and Mr. Davis and I would like to take
19 those up before getting into the argument on the insurance issues,
20 if we may do that?

21 THE COURT: Sure. Let's do that and then we will break
22 for five minutes and then I will come back and deal with the
23 insurance issues.

24 MR. WITTMANN: Your Honor, on Jan 17th we filed a Rule to
25 Dismiss with Prejudice the claims of 16 plaintiffs for failure to

1 file plaintiff profile forms, despite notice. We filed the rule
2 only after several notices of failure to file were sent to counsel
3 and we got no response. The rule was served by File & Serve and it
4 was e-mailed or mailed to all involved counsel, and we have
5 Exhibit 1 to our Rule, which sets forth the cover letters and the
6 cover e-mails, and Exhibit 2, which we will file with the court, the
7 File & Serve receipt for service of the rule.

8 On January 26th according to the order requiring the
9 plaintiffs file any opposition by February 16th, Merck served the
10 order by File & Serve and will file Exhibit 3 reflecting the File &
11 Serve receipt of that order. We also sent a copy via certified
12 mail, return receipt requested, and we received oppositions from the
13 plaintiffs in three cases: Inskeep case, the Gwendolyn Woods and
14 Shantall Thomas case. In each of those oppositions counsel
15 indicated to us an inability to contact their clients. We didn't
16 reply to those oppositions and we seek dismissal with prejudice for
17 these cases, all of which have been pending since 2005.

18 In another group of cases, the plaintiffs didn't file any
19 opposition, and that consists of the Rayford case, the Rodgetta Jett
20 case, the Russell Lane case, the Betty Baker case, the Doreen
21 Anderson case, the Patricia Rini, R-I-N-I case, the Barbara Donoho
22 case, and the Anita Parks case. Copies of certified mail return
23 receipt serving the order compelling a response by February 16th, we
24 would offer in globo as exhibit four to this motion.

25 Merck received signed receipts indicating delivery to all

1 but Mr. Lawson who represents plaintiff Anita Parks. According to
2 the postal service, he has not returned the card. However,
3 Mr. Lawson originally received notice of the missing PPF on June
4 28th via mail and fax and again on September 28th, 2006. Exhibits Q
5 and GG to Merck's rule contain the PPF information via mail and fax.

6 In addition, the rule was served on January 17th, 2007,
7 via File & Serve and e-mail, and those services are reflected as a
8 part of Exhibits 1 and 2. The order was served on January 26th as
9 reflected in Exhibit 3. It's clear that Mr. Lawson had repeated
10 notice but has failed to respond. So, your Honor, Merck asks that
11 these eight cases, including the Parks case, be dismissed with
12 prejudice.

13 In addition, your Honor, we've got four additional cases
14 that are in the process of being dismissed voluntarily or have
15 already been dismissed, that's the Carmen Rodriguez, the Jackie Shaw
16 case, the Phillip Nunn case, and the Kerns Ashworth case. So the
17 rule is satisfied vis-a-vis those four plaintiffs, and I will give
18 your clerk a document that will reflect these actual case names so
19 that she won't go nuts after this is all over.

20 This leaves one case, your Honor, which is the Enrique
21 Enriques case, who is a plaintiff in the case of Castillo v. Merck,
22 and we may have inadvertently filed a rule to show cause for this
23 plaintiff. Plaintiff's counsel Houssiere Durant Houssiere appears
24 to have sent Merck a fax letter on December 28th indicating that his
25 client is not claiming to have suffered a myocardial infarction,

1 ischemic stroke or death, see the event as defined by Pretrial Order
2 18(c). And we received two similar faxes from Mr. Houssiere on
3 December 28th, 2006 regarding Alicia Guzman and Jose Granado.

4 We have no record of receiving the fax regarding Enrique
5 Enriques, and we filed our Rule To Show Cause, we believed, based on
6 the allegations in the original complaint that Mr. Enriques did
7 indeed suffer a CV event. In light of the opposition that they
8 filed on February 16th, we withdraw the application without
9 prejudice as to Mr. Enriques and reserve the right to renew the
10 application if the plaintiff refuses to enter into a standard form
11 stipulation that he is not claiming a cardiovascular event.

12 So to sum all of that up in short order, your Honor, Merck
13 asks the court to grant its rule and enter an order dismissing with
14 prejudice the following 11 cases, and I'll give your clerk and court
15 reporter a copy of these specific numbers so I can get through it
16 more quickly. The Inskeep case --

17 THE COURT: Let's do this not overly quickly. Let me take
18 them one at a time the following cases: Mike Inskeep v. Merck,
19 Docket No., what is that 2:05-cv-06074.

20 MR. WITTMANN: Yes.

21 THE COURT: And what's the date of the deficiency notices?

22 MR. WITTMANN: The date of the deficiency notice --

23 THE COURT: August the 2nd, 2006 first, no response;
24 September the 28th, 2006, no response. Is that correct?

25 MR. WITTMANN: That's correct, your Honor.

1 THE COURT: I'll dismiss that case.

2 MR. DAVIS: Your Honor --

3 THE COURT: Over the objections of plaintiffs committee.

4 MR. DAVIS: We are on the Inskeep case?

5 THE COURT: Yes.

6 MR. DAVIS: With respect to the Inskeep case, and all of
7 these cases, the PSC objects to any dismissals.

8 In addition of fulfilling our obligation as the court
9 directed Plaintiff's Liaison Counsel, we communicated with the
10 Beasley Allen firm on February the 13th by e-mail and by telephone
11 to advise them that we had received the rule to show cause why a
12 case should not be dismissed with prejudice that Merck had filed.
13 We sent them a copy of orders, we advised them of the hearing date,
14 and we advised counsel, as we did with all of the others, that the
15 court may dismiss the case for failure to reply and suggested that
16 they do, in fact, reply. So we have provided notice to counsel.

17 THE COURT: All right. Fine and I will dismiss the case
18 with prejudice.

19 Woods is the next one, Gwendolyn Woods, Civil Action
20 2:05-cv-03375. The date of the notice, first notice was May 3rd,
21 2006.

22 MR. WITTMANN: That's correct, your Honor.

23 THE COURT: No response. Next notice September 28th,
24 2006, no response.

25 MR. WITTMANN: That's correct, your Honor.

1 MR. DAVIS: Again, Plaintiff's Liaison Counsel did the
2 same thing with respect to this matter as we did for the Inskeep for
3 the same law firm.

4 THE COURT: Overrule the plaintiff's objection and dismiss
5 the case with prejudice.

6 Next one is Betty Rayford, 2:05-cv-02354, first notice was
7 May 5th, 2006, no response. Second notice, September the 28th,
8 2006, no response.

9 MR. WITTMANN: That's correct, your Honor.

10 MR. DAVIS: Your Honor, with respect to this one, we
11 notified Jim McCune, who we understood to be counsel for the
12 claimant, on February 13th. We did that by e-mail as well as by
13 telephone, and gave the same information as we did with the priors.

14 THE COURT: It's also dismissed with prejudice. What's
15 the next one?

16 MR. WITTMANN: Rodgetta Jett on behalf of Vivian Colvin.

17 THE COURT: Civil action 2:06-cv-00282, the first notice
18 was August the 2nd, 2006, the second September the 28th, 2006. No
19 response to either notice.

20 MR. WITTMANN: That's correct, your Honor.

21 THE COURT: Dismissed with prejudice. The next one is
22 Russell Lane.

23 MR. WITTMANN: Yes, your Honor.

24 THE COURT: That's 2:05-cv-01121. First notice was
25 February 15th, 2006, no response; second notice September 28th,

1 2006, no response.

2 MR. DAVIS: Your Honor, again on Russell Lane, we
3 contacted Houston Warren & Griffin on February the 13th and gave the
4 same information.

5 I need to go back to the Rodgetta Jett because I need to
6 locate that, and I won't hold the court up right now.

7 THE COURT: All right. The Russell case dismissed with
8 prejudice.

9 Shantall Thomas, 2:05-cv-01024, first notice February 16,
10 2006, next notice September 28th, 2006. No response in either one.

11 MR. WITTMANN: That's correct, your Honor.

12 THE COURT: Dismissed with prejudice. Clarence Abrams,
13 2:05-cv-05204 --

14 MR. DAVIS: Your Honor, can we stop one moment, please.

15 THE COURT: Sure.

16 (WHEREUPON, A DISCUSSION WAS HELD OFF THE RECORD.)

17 THE COURT: I thought you all checked this before.

18 MR. WITTMANN: We did, your Honor. Mr. Davis wants to
19 stop and check his list, your Honor.

20 MR. DAVIS: Your Honor, we are going to need a couple of
21 minutes, I think. I apologize, but my list differs than what I am
22 hearing right now.

23 THE COURT: Give him an Exhibit A and let him go through
24 it.

25 MR. WITTMANN: He has a copy of it, your Honor.

1 THE COURT: We will take a ten minute break at this time.
2 When we come back I will deal with the rest of this and also I will
3 deal with the motion. Thank you. The court will stand in recess.

4 THE DEPUTY CLERK: Everyone rise.

5 (WHEREUPON, A RECESS WAS TAKEN.)

6 THE COURT: Okay. Be seated, please. We will continue
7 with Merck's Motion to Dismiss with Prejudice. We were at Clarence
8 Abrams, was it?

9 MR. WITTMANN: Betty Baker, your Honor, who is a plaintiff
10 in the Abrams v. Merck case. Docket No. 2:05-cv-05204.

11 THE COURT: First notice was February 16th, 2006; the
12 second notice was September 28th, 2006.

13 MR. WITTMANN: That's correct. Betty Baker, she is one of
14 multiple plaintiffs in that case, and Mr. Davis wanted to make sure
15 the whole case isn't going, just Betty Baker's case.

16 THE COURT: Betty Baker's claim is the only being
17 dismissed?

18 MR. WITTMANN: That's correct, your Honor.

19 THE COURT: That's dismissed with prejudice.

20 MR. DAVIS: And we provided communication on February the
21 13th, 2007 with plaintiff's counsel to the Mason firm, Mr. Mason.

22 THE COURT: Anderson v. Merck is the next one,
23 2:06-cv-00427. First notice was May 18th, 2006 and second September
24 28th, 2006.

25 MR. WITTMANN: That's correct, your Honor.

1 THE COURT: No response following either one.

2 MR. DAVIS: Again, on February 13th we provided
3 communication to the plaintiff's firm.

4 THE COURT: And that case is dismissed with prejudice.
5 Patricia Rini v. Merck, Civil Action 2:05-cv-01083. First notice
6 April 7th, 2006; second notice September 28th, 2006. No response to
7 either one.

8 MR. WITTMANN: That's correct, your Honor.

9 MR. DAVIS: Again, on February 13th we provided notice to
10 the plaintiff's firm.

11 THE COURT: Dismiss that case with prejudice. Kerns
12 Ashworth v. Merck, 2:05-cv-05561 --

13 MR. WITTMANN: Your Honor, that case, they've stipulated
14 to -- the dismissal has been filed since we filed our motion, so
15 that's dismissed.

16 THE COURT: That's dismissed by stipulation.

17 MR. WITTMANN: Yes, your Honor.

18 THE COURT: Okay. The next one is Barbara Donoho, is that
19 it?

20 MR. WITTMANN: Donoho.

21 THE COURT: Is that the next one?

22 MR. WITTMANN: That's correct.

23 THE COURT: Barbara Donoho v. Merck, 2:05-cv-05 896, first
24 notice was June 8th, 2006, second notice September 28th, 2006. No
25 response to either one.

1 MR. DAVIS: On February 13, 2007 we had communication with
2 Dianne Fenner, plaintiff's counsel in that matter.

3 THE COURT: That matter is dismissed with prejudice.
4 Anita Parks v. Merck, 2:05-cv-06517. First notice was June 8th,
5 2006; second notice September 28th, 2006.

6 MR. WITTMANN: That's correct, your Honor.

7 MR. DAVIS: On February 13th we had communication, like
8 the others, with the Lawson Law Firm in that matter.

9 THE COURT: I will dismiss that case with prejudice. Any
10 other ones?

11 MR. DAVIS: Yes, I want to clear up. I had not
12 communicated to the court on the Rodgetta Jett case, on February 13,
13 2007 we communicated with Eason Mitchell, plaintiff's counsel in
14 that firm.

15 THE COURT: All right. And that case I'll dismiss, or
16 have already dismissed with prejudice. Any other ones?

17 MR. WITTMANN: No, your Honor.

18 THE COURT: Okay.

19 MR. WITTMANN: In connection with those that are dismissed
20 though, your Honor, we would file in evidence at this point Exhibits
21 1, 2, 3, 4, and Exhibits Q and GG that we referred to during the
22 course of presentation and make those a part of the record.

23 THE COURT: All right. I will allow that to be a part of
24 the record.

25 I would like to say also, in dismissing all of the cases

1 I've considered the public interest in the expeditious resolution of
2 the litigation. I've also considered the court's need to manage its
3 docket, particularly significant in the MDL litigation. I've also
4 considered the risks of prejudice to the defendant, I've given the
5 parties every opportunity to respond, both from the court's urging,
6 as well as various letters.

7 Also during the pretrial conferences, which I hold on a
8 monthly basis in open court, I've taken the opportunity numerous
9 times to talk about the need to respond to these profile forms.
10 It's for everyone's benefit. It's a way of conducting easy
11 discovery, efficient discovery, and it's also a way of getting
12 information effectively and efficiently.

13 I've considered the risk and prejudice of the defendant,
14 public policy favor and disposition of cases on the merits, done
15 everything I can to push that a response be filed, posted it on web
16 sites, emphasized the necessity to respond to these matters.
17 Notwithstanding that, some people haven't. I assume that they have
18 abandoned their case.

19 After considering all of these issues, I have dismissed
20 the cases with prejudice as I've just done. Okay.

21 MR. WITTMANN: I think that concludes the status
22 conference from the defense standpoint, your Honor.

23 THE COURT: All right. Fine.

24 All right. The motion that I have before me is a motion
25 to produce the various insurance policies from 1991, also 30(b)(6)

1 depositions of a number of people to explain the nature and extent
2 and other information regarding the insurance issues. Let me hear
3 from the parties at this time.

4 MR. DAVIS: Your Honor, Leonard Davis on behalf of the
5 Plaintiffs Steering Committee. Drew Ranier will be participating in
6 this argument for the plaintiffs.

7 THE COURT: Mr. Ranier.

8 MR. RANIER: Thank you.

9 MR. BARNETT: Your Honor, Ben Barnett on behalf of Merck.
10 Actually we filed the original motion as a motion for protective
11 order, so I think in the ordinary course of things we would go
12 first.

13 THE COURT: I think that's right, Merck has filed a
14 motion, there was documentation requested and also deposition
15 notices sent out, Merck has filed a motion for protective order.

16 MR. BARNETT: I know Mr. Ranier is anxious to get to his
17 slides, and I don't want to slow down that process, but just
18 briefly, your Honor, consistent with the court's direction before,
19 this discovery at issue involves discovery served on both Merck as
20 well as nine third party insurers. Not all of Merck's insurers, but
21 at least nine of them. And we have to the extent possible tried to
22 coordinate our presentation to you today.

23 I did want as a courtesy to the bench to introduce the
24 counsel that are present. And because we are on the record, maybe
25 we can ask them to just briefly make their appearances. The first

1 would be Mr. Allan Moore, who represents Merck in its insurance
2 matters. Allan, do you want to make your appearance for the record?

3 MR. MOORE: Allan Moore, Covington & Burling.

4 MR. BARNETT: The second would be Ms. Poag who represents
5 Steadfast Insurance.

6 MS. POAG: Molly Poag with Steptoe & Johnson, and I do
7 represent Steadfast.

8 MR. BARNETT: The third would be Mr. Quackenboss.

9 MR. QUACKENBOSS: Good morning, your Honor, Bill
10 Quackenboss from Smith, Stratton, Wise, Heher & Brennar on behalf of
11 American Alternative Insurance.

12 MR. BARNETT: Next would be Mr. Marcusa.

13 MR. MARCUSA: Stephen Marcusa with Bivona & Cohen on
14 behalf of Lexington Insurance Company.

15 MR. BARNETT: And finally, last but certainly not finally,
16 Mr. Hellmers here in New Orleans.

17 MR. HELLMERS: Good morning, your Honor, Carl Hellmers
18 from Frilot Partridge on behalf of CNA.

19 MR. BARNETT: And to give the court a sense of how we at
20 least intend to proceed absent further guidance from the court, I've
21 asked the insurers, the counsel of the insurers to really focus on
22 two specific issues, which is the impact of the request of discovery
23 on the confidentiality orders that exist within the two pending
24 arbitrations, and the second, the impact of this discovery on them
25 as third parties.

1 The key here, your Honor, the key question given the fact
2 that we've produced 25,000,000 pages of documents over 7,500 Merck
3 profile forms, all of the case specific documents for the six trials
4 that the court has heard is is this discovery about insurance, is it
5 justified and is it necessary at this point in time. And the short
6 answer to that is no, and perhaps the most expeditious way to
7 proceed is to discuss specifically the justifications that the PSC
8 has announced for why they need this discovery. And so I will try
9 to run through those as quickly as I can.

10 The first relates to the policies. They argue that Merck
11 has not, Merck did not in its Rule 26 disclosures produce all of the
12 relevant policies, and on that there is a simple factual dispute.
13 We have produced all of the relevant policies. Vioxx, as the court
14 knows, did not go on the market until 1999, and we have produced all
15 of the occurrence reported or claims made policies that could
16 potentially provide any sort of recovery for someone alleging a
17 Vioxx related injury.

18 Frankly, no further production of the policy is going to
19 change those facts, the policies are what they are. And moreover,
20 if you look at the committee notes to the disclosure requirement,
21 it's very clear that the idea is to give both parties a realistic
22 sense of what the litigation strategy is and what the chances are
23 for settlement. And it's hard to believe that as we sit here today
24 in 2007 there is really any mystery about what Merck's litigation
25 strategy is or its attitude towards settlement.

1 So in that event, there is really no legitimate purpose is
2 served by requiring Merck to produce policies that are frankly not
3 going to provide any avenue for recovery by the plaintiffs.

4 The second issue goes to, and this actually did come out
5 in the meet and confer session we had with the PSC on December 22nd,
6 is that they want this insurance, all of this insurance discovery to
7 be able to establish what Merck knew and when it knew it. Well, the
8 reality is is they've got in excess of 25,000,000 pages from the
9 files of peoples, of employees at Merck and their departments that
10 directly go to the issue of what Merck knew about Vioxx and when it
11 knew it. And at the end of the day they have not yet been able to
12 articulate what new evidence would be in insurance files for people
13 that were not directly involved in Vioxx that that would add to the
14 universe of documents that they already have and which they've
15 already used against Merck in the six trials here in the MDL and
16 trials nationwide.

17 The third suggestion is that somehow this might, again
18 keeping with the knowledge of notice, might go to establish
19 negligence on the part of Merck. And the difficulty again yet to be
20 explained by the PSC with that argument, is it smacks right against
21 Rule 411, which would flatly prohibit that in terms of establishing
22 liability through insurance, as well as the Jones case -- I'm sorry,
23 the Reed case from the Fifth Circuit, as well as the Jackson and
24 Jordan cases issued by other courts in this district. And again,
25 perhaps today Mr. Ranier or someone can articulate what it is that

1 they will try to use at trial that would come out of these insurance
2 files that would make it an appropriate subject for discovery.

3 The fallback position for the PSC then goes to the direct
4 action statutes, and they cite the direct action statutes in
5 Louisiana, Wisconsin, Puerto Rico and Guam. And in some respects
6 that is a fairly flighted mission that they don't have any coverage
7 claims in this litigation. This is a personal injury tort liability
8 case, it's not a coverage case.

9 But in any event, it's hard to understand given the
10 information that we have given to the PSC either in exchange of
11 e-mails or in the meet and confer and now with this briefing what
12 purpose a direct action suit, if it were filed some day, would
13 serve. The reality is that right now Merck is pursuing through the
14 arbitrations full limits coverage for all of the insurance that it
15 has available to it for its Vioxx liabilities. Every dollar of it.
16 And right now, and again this is a matter of public record, both in
17 regulatory filings as well as filings before this court, right now
18 the expenses associated with defending the Vioxx lawsuits, the
19 money, the costs associated with the defense has already either been
20 spent or is reserved to be spent such that the full limits, if, in
21 fact, recovered, they're gone. And so I think there is a question
22 as to what purpose a direct action, if it were filed, would
23 ultimately serve.

24 And then the last point I would make, your Honor, in terms
25 of the discovery is the confidentiality orders that do exist in the

1 two arbitrations. There is no dispute that the orders exist, there
2 is no really dispute from the briefs that those sorts of words,
3 which are routinely entered every day and honored by other courts,
4 are entitled to comedy, courtesy and respect. That's a quote
5 directly from their brief. But they've sort of flipped that and
6 have said, well, if there is such an order, that makes this
7 insurance information presumptively discoverable. And that's
8 exactly wrong. Parties to arbitrations or insurance litigation
9 enter these orders because they want the right to be able to resolve
10 those disputes without it opening a second front for discovery in
11 the underlying action.

12 The reality is the underlying facts in terms of Vioxx have
13 been fully discovered in this litigation, they've been fully
14 discovered in the arbitration, and there is no reason to reproduce
15 to the PSC that which it already has. But what they're not entitled
16 to and what the order bars them from doing is essentially
17 piggybacking on the work of the insurance lawyers and trying to get
18 that information from the arbitration. And they have made no
19 showing that would justify this court overriding that protection.

20 Again with the idea of keeping this brief, those are the
21 points that I'll address at this point, and now I would ask the
22 insurance counsel to address briefly both the confidentiality
23 orders, as well as the impact of this discovery on them as third
24 parties.

25 MR. QUACKENBOSS: Your Honor, first thank you for allowing

1 the insurance companies to be heard on this matter. Confidentiality
2 orders are commonplace in coverage arbitrations and coverage
3 litigations. Almost always used in the larger coverage matters.
4 These confidentiality orders that are used, they help facilitate the
5 resolutions of the coverage disputes between the insured and their
6 policyholder. It allows the parties to litigate freely and they
7 don't have to have the fear that it's another avenue for discovery
8 in potentially an underlying matter or that they're going to
9 disclose confidential business information.

10 The Plaintiffs Steering Committee here is asking you to
11 invalidate a confidentiality order that is no different than any
12 other confidentiality order that you will find in any other
13 arbitration or any other litigation. And they're asking you to do
14 it under circumstances that aren't any different generally from what
15 you're going to find in a products liability underlying action.

16 The confidentiality orders at issue here with Merck and in
17 this matter were intended to keep certain documents and information
18 confidential, and they are operating as planned. They are keeping
19 certain documents confidential and these documents are currently
20 help facilitating the resolution of Merck's insurance coverage
21 disputes. The plaintiffs are going to assert or the plaintiffs do
22 assert that Merck and its insurers are somehow hiding behind the
23 shield of the confidentiality agreement, they're keeping away
24 important documents from them. That is not true. Merck has noted
25 that it already provided plaintiffs with all of the adverse event

1 data, all of the underlying facts, and they have what they are
2 entitled to receive. Moreover, the plaintiffs just haven't made the
3 required showing to show that the confidentiality agreement should
4 be stricken.

5 The effect of invalidating the instant confidentiality
6 agreements could have unknown and unforeseen consequences.
7 Essentially it could open a Pandora's box up, because what we have
8 here is parties to a London arbitration who are not permitted to see
9 documents that are at issue or that are being used in the XL
10 arbitration, parties to the XL arbitration that are not permitted to
11 see documents that are in the London arbitration, and we have one
12 insurer here, Lexington, who is not a party to any of the
13 arbitrations.

14 Additionally, Merck's lead insurer, SRI, who is a party to
15 the London arbitration, was not even served with a subpoena in this
16 matter. They are not here to be heard and certainly it's very
17 likely that their rights will be affected if these confidentiality
18 orders are stricken.

19 This is probably one of the largest product liability
20 cases currently going on in the United States, and if the court
21 decides to invalidate the confidentiality orders with respect to
22 these arbitrations here, it may have chilling circumstances to other
23 arbitrations and other litigations with respect to coverage matters,
24 how policyholders and insurers resolve their disputes. They will
25 certainly take notice if these confidentiality orders are stricken.

1 And lastly, I just want to briefly touch on the burden
2 issue. The plaintiffs have served or attempted to serve nine
3 non-party insurers. The subpoenas seek a broad range of documents,
4 they seek depositions, and then that in itself is a large burden on
5 the insurance company. Then we must look at it in the sense they
6 have served these subpoenas that are identical to the discovery, the
7 insurance discovery they have served upon Merck; and under those
8 circumstances, if they are entitled to the documents, which is yet
9 to be determined, they should get those from Merck, not from nine
10 non-party insurance companies to this matter.

11 THE COURT: Okay. All right.

12 MR. QUACKENBOSS: Thank you.

13 THE COURT: Thank you very much. Anybody else? You have
14 to understand that I received a lot of documents from everybody and
15 I have read them, I read the material. So.

16 MR. MARCUSA: Your Honor, I just very briefly want to
17 address the burden issue. The burden is not simply the fact that
18 they've asked each of the insurers to designate one, two or three
19 witnesses in Lexington's situation, for instance, since the policy
20 was underwritten in England, we would have to produce probably three
21 witnesses. I would suspect the other insurers would have to do the
22 same thing.

23 The issue becomes if this seems to be an end-run around
24 Merck's objection, apparently what happened is when Merck filed its
25 original objections to the discovery served upon it originally last

1 October, then the PSC then served the document and deposition
2 subpoenas upon these nine insurers. Clearly it would seem that in
3 the first instance if there is to be discovery ordered that it
4 should come from Merck and then there would be an issue of whether
5 or not there is anything more that the insurers would have.

6 The documents that the insurers have are essentially what
7 Merck has given them. We've talked about duplicative efforts,
8 that's basically what the insurers have.

9 I just wanted to address specifically the issue of
10 Lexington, whom I represent. The PSC has suggested that because the
11 insurers haven't been involved in these arbitrations that it's less
12 of a burden for the insurers because they've already done some
13 document collecting, gathering and collating. Well, to the extent
14 that Lexington is different, and it is different because it is not
15 in those arbitrations, Lexington, of course, has not done any of
16 that review and collating; and to the extent it would be burdensome
17 for everybody, it would be even a bigger burden for Lexington.
18 Thank you, your Honor.

19 THE COURT: Thank you very much. Anybody else from the
20 defense, movants? Let me hear from the respondents.

21 MR. DAVIS: Your Honor, Drew Ranier is going to make the
22 argument for the Plaintiff Steering Committee. However, I just want
23 to factually set how this came down the pike and make sure that it's
24 very clear.

25 The PSC issued discovery requests for insurance matters to

1 Merck. Merck did not respond or object and after the PSC became
2 frustrated by not getting the information, we issued third party
3 subpoenas and deposition notices to a number of the insurance
4 carriers. It was Merck's request and Merck's suggestion that the
5 insurance carriers be brought into an omnibus type motion. We, the
6 PSC, quite frankly believe that the information should come from
7 Merck first. We believe that by having the insurance carriers in
8 here has convoluted it, which is what Merck wanted to do, quite
9 frankly.

10 That said, we are prepared to go forward and address each
11 one of these issues that we don't think are a burden at all. And
12 quite frankly, it's a small segment of documents that are at issue
13 and a small number of witnesses who are at issue. And the burden is
14 on the plaintiffs to have to fish through 25,000,000 or however many
15 documents without even getting information by Bates number or things
16 like that. What we get are some policies and that's it. I'll let
17 Mr. Ranier address the rest.

18 MR. RANIER: Thank you, your Honor. Good morning, Drew
19 Ranier for the PSC, may it please the court. Just a little bit of
20 background and context here. We are talking about between half a
21 billion dollars and several billion dollars of insurance, depending
22 on how you look at these policies. There are 17 insurance
23 companies, there are 58 policies. This is a complex program of
24 insurance. It's not just even where you have a CGL policy and a
25 couple of excess policies above it. We've got the chart here on the

1 machine now that you can see, and this is our coverage chart that we
2 did. Can we back it out a little so we can see the whole thing.

3 We've got layers, multiple layers of insurance, it looks
4 like the United Nations flag, it is like the United Nations of
5 insurance, British, German, Bermuda, U.S. companies, multiple
6 layers, all changing the percentages within those layers from time
7 to time. This is a complex insurance situation. And the request by
8 the PSC that we have, we don't need 16 depositions, we need one or
9 two good depositions. The lead insurer SRI, if they managed all of
10 this, they could explain how this coverage thing fits together.

11 This chart and the blocks on it, your Honor, that show
12 some of the problems here, the white blocks that are not explained.
13 There are probably simple answers to those questions, so what we're
14 asking the court for there is a 30(b)(6) deposition to explain them,
15 and that's just routine every day garden variety discovery. We need
16 to understand this complex plan, and especially in light of the fact
17 that this is an MDL, 20,000 or more plaintiffs, probably for
18 discovery purposes it's 50,000 plaintiffs. It is the coordinated
19 discovery thing in the country and it's about the information, it's
20 about doing it once. The defendants ought to be eager to do it once
21 rather than time and time again in the future. And it fits like a
22 glove here.

23 So basically probably one deposition from Merck and one
24 from one of the insurers will help us to explain all of the problems
25 on this chart. If you look at the gray line on the left, your

1 Honor, that's the excess category, the light gray.

2 THE COURT: Right.

3 MR. RANIER: You can see that a number of those policies
4 are missing. There may be simple explanations to that. A number of
5 them don't have policy numbers on them. It's the numbers change a
6 lot. Many of these policies are written on different policy limits,
7 so even in this top layer of the two grays, some of these policies
8 are written on 300,000,000, some of them are written on 500,000,000,
9 some of them are written on 850,000,000, which really means some of
10 the lines on this chart ought to be vertical there because certain
11 of these companies don't go all the way to the top, they will just
12 be -- they are really more layers that are on this chart than are on
13 Merck's chart.

14 And what everybody needs to know is certainty, we need to
15 have the certainty of what this insurance picture is. And from the
16 standpoint of the policies, we do not have that now. We have had a
17 number of people who specialize in insurance look at this, and we
18 need the court's help on that because Merck and the insurers are
19 resisting any kind of discovery to do the most basic explanation of
20 these policies. And what they say is, trust us, we're telling you
21 you've got it all, this is what it is but it's hard to understand.
22 And we need to do it right and we need to do it one time. So that's
23 the basic thing on the policy.

24 And of course, you know, again, I mean, this is very
25 straightforward discovery. The burden as the Fifth Circuit says in

1 McLeod and Tajik cases is on the defendant who is resisting the
2 discovery, it's not on the plaintiff to explain specifically what
3 the problems are in this complex insurance program. And that's why
4 we need the discovery, it's why we need the underwriting files, too.

5 Of course insurance is treated a little bit specially.
6 The 411 argument is really an argument for a later date, your Honor,
7 where insurance policy shouldn't influence liability in the trial of
8 a case. Right now we are just at the discovery stage of this, of
9 insurance. And it's really irrelevant. I mean the rule, Rule 26
10 says you must disclose insurance. It doesn't say you may, you must
11 disclose it. And so whether that policy is admissible in evidence
12 under 411 is irrelevant. Rule 26, you must disclose anything that
13 may provide coverage.

14 And if you go to the advisory notes for Rule 26, they are
15 very, very strong evidence in support of the plaintiff's request for
16 underwriting files and a couple of depositions. Advisory notes, and
17 I quote, "whether the insured believes there is coverage or not, the
18 policies have to be produced so that everybody can do, all parties
19 can have a fair appraisal of the insurance situation."

20 And the case law that follows the advisory committee notes
21 in the rule is very clear. The Boyer case rejected the summaries,
22 and that's kind of what Merck is trying to do here and the insurers
23 saying, well, we've given you these policies, we've given you this
24 coverage chart which is basically just a summary, and that's all you
25 need. And the court specifically rejected that in the Boyer case.

1 They said case summaries don't do, you've got to do the policies.
2 In the Calabro case, the court rejected the exclusion argument where
3 the insured said we are not giving you the policies because there
4 are exclusions which clearly don't apply. The court rejected that
5 and said you've got to give the policies to the other side, you've
6 got to give the complete insurance picture to the other side and
7 then let them decide, you know, what their opinion of those
8 exclusions are.

9 And then finally, in the Covey case, the defendants argued
10 just like Merck is doing in this case, that there is no coverage.

11 Now, that's interesting, your Honor, because in this case
12 Merck came into court in their first motion and brief and said that
13 for the period 1990 to '96 that Vioxx wasn't being developed, there
14 is no involvement of Vioxx during those years. Well, anybody that's
15 been to any of these trials knows that's not true. And what we did
16 in our brief was we attached a copy of their on timeline that they
17 used in the jury argument, this shows development going back to the
18 early 1990's.

19 Well, in the reply brief they changed their position. In
20 their reply brief what they said is, oh, those policies from '90 to
21 '96, they are claims made policies, they are not occurrence
22 policies, and since no claims were made in that period, you're not
23 entitled to those policies. That's exactly what the Covey case said
24 is wrong, it's exactly what the advisory committee notes say is
25 wrong because the issue is you produce the policies, whether you

1 think there is coverage or not.

2 So that's the law strongly in favor of the plaintiffs on
3 that issue and you should get all of those policies from 1990 to
4 1996.

5 We talked about the policies from 1996 to 2004. That's
6 what's on the chart. There are many, many holes in this chart,
7 many, many unanswered questions, perhaps one 30(b)(6) deposition can
8 take care of that. The fact is we have a 600 page dump basically of
9 materials from them that we've had to figure out and done our best
10 with that, but what's on that chart that we provided to the court is
11 some of the major problems we've had with that.

12 After 2004 we have nothing also. So we have nothing
13 pre-96 and nothing after 2004. If there are any policies at all,
14 general liability type policies. And, your Honor, they kind of set
15 up a straw men when they said that our request is burdensome, you
16 know, they want the travel insurance and workman's compensation
17 insurance, that mischaracterizes what we want. They know what we
18 want, we want liability and products liability cases, we don't want
19 extraneous materials, but we do need to know all of the insurance
20 that is there.

21 The second stage beyond disclosure is 26(b) discovery and
22 it doesn't stop with 26(a). 26(a) is where they've got to produce
23 the policies and then the question is what about 26(b) after that?
24 And Merck cited this case, it's the Simon v. Sural case, your Honor,
25 and they cited it for the proposition that you don't have to produce

1 anything more than the policies at all, and that was not the holding
2 of the case. The holding of the case was under 26(a) you just
3 produce the policies. If you want more and you need more, you go to
4 26(b), that was the holding of the case. They said this case the
5 plaintiffs only asked for 26(a). So we go to 26(b), and what do we
6 need under 26(b)? We need the underwriting files to explain this
7 complex situation when we depose the person who knows about it so we
8 can see the documentation that explains that, that's No. 1.

9 And let's be clear about this. The insurers are not
10 stipulating to coverage here, your Honor. These friendly people at
11 these tables are in two hand-to-hand combat struggles in London.
12 And that's the other context of this. If these people are
13 litigating in London over this coverage, and they're not just
14 litigating about invalidating the policies because Merck didn't tell
15 them about the risk of Vioxx, they are litigating the actual
16 coverage itself. So the PSC is obligated to find out what those
17 coverage issues are. In addition to the fact that Merck didn't tell
18 them like they didn't tell the plaintiffs.

19 So all of this, the liability and the coverage are
20 inseparable. These issues are inseparable because they all relate
21 to coverage. And in the context of this arbitration, we know that's
22 what's going on, but we will get to the arbitration issues in a
23 minute.

24 The insurers are not stipulating to coverage, they are
25 fighting it, they are taking positions that all of these policies, a

1 lot of these policies don't come into play, a lot of them are less
2 than what they say on this chart. The chart that you have from
3 Merck is not the insurers chart, even though it's part of their
4 brief and mentioned in their brief and the insurers have signed off
5 on the brief, there is no stipulation on coverage.

6 While we're talking about the insurers on that, because
7 there is a conflict about coverage, it would be important for us to
8 have a 30(b)(6) deposition of the insurers, not just of Merck. So
9 we really need them of both. And Lenny Davis was talking in sort of
10 procedural terms how this unfolded because that's his bailiwick, but
11 really we do need an insurance company deposition because they are
12 denying coverage in many respects. So in order for us to report to
13 50,000 plaintiffs in the United States, to 2,000 plaintiffs lawyers
14 who expect us to do our job here, in order for the MDL court to be
15 the court of the discovery proceeding, we need that information and
16 that's not unreasonable, that is garden variety discovery on the
17 subject of insurance.

18 And of course, you know, we have all of the direct action
19 considerations where it's even more compelling, but this is just
20 under Rule 26 that we should be doing this. And as to its
21 importance, your Honor, whether it's 500,000,000 or a billion or
22 2,000,000,000, before long as Everett Dirksen used to say, you're
23 talking about real money. And what the insurers intend to do with
24 it. I mean, what Mr. Barnett said is they're paying us, they're
25 paying the lawyers, the claimants are never going to see any of

1 this, this is all irrelevant, it's an economic irrelevancy argument.

2 Well, first of all, that's just speculation. If I were an
3 insurer and my insurance company and I'm in Louisiana, I would be
4 very reluctant to pay every dime of my policy that the plaintiff by
5 law has an interest in to a defense lawyer for defense costs. I
6 would be very careful about, you know, which debtor I would give
7 that money to, which person that had a claim on those proceeds
8 because if I paid it, I may still be liable for it.

9 And in final analysis, whether it's paid to defense people
10 or it's paid to someone else, it's still another billion dollars for
11 Merck. And we don't know where this litigation is going to go, your
12 Honor, that's a lot of million dollar claims that could be paid some
13 day with that money. So the fact that they --

14 THE COURT: Let me interrupt you, but I understand your
15 issue and I understand the defendants.

16 MR. RANIER: Can I talk about the arbitration just a
17 little, your Honor, just real quickly?

18 THE COURT: Okay.

19 MR. RANIER: The confidentiality orders, this is one of
20 them here, "whereas Merck and XL had a common interest in preventing
21 disclosure of information and documents that could jeopardize the
22 defense and resolution of the underlying claims against Merck,"
23 that's the XL confidentiality order. This is the one with the seven
24 or eight insurers: "Whereas, Merck and the insurers have a common
25 interest in preventing the disclosure of information and documents

1 that could jeopardize the defense and resolution of the underlying
2 claims against Merck."

3 We have cited in our brief UK law, American law on
4 confidentiality in arbitration, and we have cited American law on
5 orders, confidentiality orders and protective orders. All of those
6 cases -- and Merck now agrees with us in their surreply. At the
7 beginning they say confidentiality, it's absolute. In their
8 surrebuttal, they now agree that the standard in all of those cases,
9 "is it necessary to a fair disposition of the litigation before us?"
10 And then how do you decide whether it's fair? The Tucker case has a
11 lot of those factors in it, we cited it in our brief, your Honor.

12 One of the key factors is inconsistency. And look how
13 inconsistent this situation is. The insurers who are sitting here
14 at table with Merck are in London saying you didn't tell us about
15 the risks of Vioxx, you didn't tell us about the cardiovascular
16 risks, you bought this insurance without telling us that. You
17 failed to disclose and we want to void that insurance. Then they
18 come to the United States and they sit at this table and say to me
19 and to the PSC and to all of the plaintiffs in the country that
20 Merck didn't fail to tell anybody anything. How could there be a
21 bigger inconsistency, and that is one of the major reasons in all of
22 that case law why, and we don't want to break open the arbitration,
23 your Honor, we just want the evidence, we want the documents and the
24 witness's testimony that relates to these issues. That's all. We
25 don't want to blow up the arbitration proceeding.

1 Now, we've made a request for their files, they're working
2 both sides, your Honor. What they say is, okay, look. What's in
3 arbitration is confidential, and then we say, okay. Well, give us
4 your insurance files which is going to have the same information in
5 it, that's where you got it from I'm sure, they say that's too
6 burdensome. So they use the confidentiality argument in the
7 arbitration, and we say, okay. We don't want the confidential
8 stuff. They say, okay, that's too burdensome for us to give you the
9 files. So they are using the confidentiality thing in every
10 possible way to obstruct discovery and they have said the purpose of
11 the confidentiality order is to obstruct discovery.

12 And that's one of the factors the Tucker case talks about,
13 your Honor, and it says, for instance, "is the confidentiality there
14 for commercial purposes, for patent protection, for trade secrets or
15 anything like that?" No, the purpose of this one here is to keep
16 the evidence from the plaintiff.

17 So where does that they leave us, your Honor? That leaves
18 us here. We are sitting in an MDL, national U.S. MDL, we've got
19 20,000 plus claimants here, we have another 20,000 in discovery
20 matters following everything we do. We've got a U.S. company,
21 50,000 plaintiffs in the United States and there's evidence in
22 London that we can't see. Neither of these people when they got up
23 and argued said there is nothing there, and they've never said it in
24 their briefs and they've never said it on the record, there is
25 nothing there that you don't already have. What they say is they

1 have 25,000,000 pages and that's enough.

2 But not one of them has said that there is no evidence, on
3 the record, in the arbitration that you don't have. Not one of them
4 said that. We know there's evidence there and we know it's
5 relevant, that's why they put it in there and we don't have it. So
6 what are we doing? We have a plaintiff in New Orleans who has
7 different evidence than an insurance company has against Merck in
8 London on the same issue. What Merck knew and when it knew it. And
9 why they didn't tell anybody about it. It's the same issue there to
10 the insurer as it is here to the plaintiffs. The plaintiff in New
11 Orleans loses, the insurer in London wins, or loses, but wins and
12 he's got different evidence that the plaintiff has here. And that
13 talk about inconsistency, I mean this is just asking for trouble in
14 the long run.

15 So we don't want to break open the arbitration. What we
16 want is the evidence that's in there to make sure that we have
17 everything that's available. And the question then is, is that
18 necessary to a fair resolution of the case here in New Orleans for
19 the plaintiff here, for the plaintiff in New Jersey or wherever?
20 Yes, it's necessary for fair resolution. Everybody ought to have
21 the same evidence. And that's the basics.

22 And the thing about the order is it also provides, the
23 confidentiality order also provides for situations like this. It
24 says by court order you can do this. And if you look at the case
25 law on all three areas, your Honor, over and over and over again,

1 there are orders which order the evidence to be produced in spite of
2 the confidentiality because the subsequent litigation needs them.

3 One of the final tests they do is, you know, is there any
4 other way for us to get it? We can't get it any other way, we can't
5 go intervene in the arbitration, we are not a party to the
6 arbitration, we are considered under UK law "strangers". So we
7 can't go there to get it there. So it's not like it was a prior
8 U.S. court that has issued a protective order where we can go there
9 first and see if we can get it lifted to get that evidence. So we
10 have no other alternative but this court.

11 So what the defendants are asking you to do, your Honor,
12 they're asking you to forever prevent the plaintiffs from getting
13 evidence in this case. They're asking you to do that. This is an
14 American corporation who has gone to London to do this evidence and
15 their insurers to prevent it from getting to plaintiffs in this
16 case. And that's a pretty radical concept, you know, when we've got
17 50,000 American plaintiffs and American corporation here that the
18 evidence is not going to be available to them. I mean that's a
19 pretty extreme position the defendants are taking.

20 THE COURT: I understand your position. I don't need any
21 rebuttal. I am ready to rule on the matter. Thank you both very
22 much.

23 Merck's motion before me is a motion to quash and also for
24 protective order. Let me say a word by way of background. On
25 October the 27th, 2006 the Plaintiff Steering Committee served Merck

1 with a Rule 30(b)(6) deposition specifying, as I gathered, some 20
2 depositions and some 21 topics to be covered. On November the 16th,
3 the defendants responded with objections and a motion for protective
4 order.

5 After Merck filed its initial motion, the plaintiffs
6 served Merck and Merck's nine insurers with similar discovery
7 requests on November the 20th and also on November the 22nd of 2006.
8 Just a couple of areas that the plaintiffs seek information on is
9 all underwriting files, all claims files, all policies back in 1990,
10 all arbitration documents with privileged logs submitted to the
11 judge or privileged information submitted to the judge, 30(b)(6)
12 depositions of risk underwriting managers, 30(b)(6) one day
13 depositions of the risk manager, and as I said a privilege log.
14 There are other areas, but those are the primary ones that they
15 wanted some assistance on.

16 On January the 16th, 2007, Merck and its insurers filed a
17 joint motion to quash and seeking a protective order, basically
18 their motions, therefore, that it's irrelevant, that the material is
19 irrelevant, that the plaintiffs already have it and that some of
20 it's privileged and that it is outside the scope and it's also
21 burdensome. The plaintiffs take the position that the material is
22 both relevant and also essential to their development of their case
23 and information.

24 I look at the law applicable to the case, and I note that
25 Rule 26(a)(1)(D) requires the disclosure, and I quote, "any

1 insurance agreement under which any person carrying on an insurance
2 business may be liable to satisfy part or all of a judgment which
3 may be entered in the action, or to indemnify or reimburse for
4 payment made to satisfy the judgment."

5 I look at the commentators discussion on the rule, and I
6 find that the purpose of the rule is to enable counsel for both
7 sides to make some realistic appraisal of the case so that
8 settlement of the litigation and the litigation strategy are based
9 on knowledge and not speculation. The committee's advisory note is
10 of assistance there, the Excelsior College v. Frye case is also
11 somewhat helpful.

12 I feel after looking at all of the material in the matter,
13 particularly this chart showing the type of policies, that I am
14 going to deny in part and grant in part the request. It seems to me
15 that the policies ought to be produced. I looked at the date and
16 some of the Medline discovery that I've looked at, I see a
17 Circulation article in 1993 and I also see a European Heart Journal
18 article of 1993, it doesn't really focus necessarily on all of the
19 issues, but it is some indication that there was some discussion or
20 some information that was germane to this type of litigation. The
21 earliest part of the medical literature that I've been able to
22 access causes me to conclude that it would be appropriate to produce
23 the policies from 1993, and also for Merck to produce a 30(b)(6)
24 person.

25 My preference would be Merck's person, but if Merck's

1 person is not able to explain the policies, then somebody else has
2 to be produced. A Merck person or a 30(b)(6) witness who can
3 explain the nature, the type, and the extent of the coverage. And I
4 am looking at the relevant coverage. I am not talking about
5 coverage on automobiles or things of that sort. I really am focused
6 on coverage that is germane to this particular case, for example,
7 the products liability coverage, the failure to warn coverage, the
8 defective design coverage, punitive damage coverage. The focus of
9 my ruling on this particular matter is on the relevant insurance
10 policies and explaining the insurance policies. I see a chart here,
11 but somebody is going to have to explain that chart and make it
12 understandable. I think the plaintiffs have to understand what the
13 policies are and what the coverage is and when Merck got the
14 coverage.

15 So produce somebody 30(b)(6) who can testify regarding
16 what kind of insurance coverage there exists, when they got it and
17 amount of coverage and who is on the risk. So to the extent that
18 that addresses the matter, I'll deny the motion in part and grant it
19 in part. Thank you very much. The court will stand in recess.

20 THE DEPUTY CLERK: All rise.

21 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

I, Karen A. Ibos, CCR, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

Karen A. Ibos, CCR, RPR, CRR
Official Court Reporter